



## DEPARTMENT OF ENERGY

### 10 CFR Part 431

#### **Appliance Standards and Rulemaking Federal Advisory Committee: Notice of Intent to Establish a Working Group for Commercial Unitary Air Conditioners and Heat Pumps to Negotiate a Notice of Proposed Rulemaking for Test Procedures and Energy Conservation Standards**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of intent and solicitation of nominations for membership.

**SUMMARY:** The U.S. Department of Energy ("DOE" or "the Department") is giving notice that DOE intends to establish a negotiated rulemaking working group under the Appliance Standards and Rulemaking Federal Advisory Committee ("ASRAC") in accordance with the Federal Advisory Committee Act ("FACA") and the Negotiated Rulemaking Act ("NRA") to negotiate proposed test procedures and amended energy conservation standards commercial unitary air conditioners and heat pumps ("CUACs and CUHPs"). The purpose of the working group will be to discuss and, if possible, reach consensus on a proposed rule regarding test procedures and energy conservation standards for CUACs and CUHPs, as authorized by the Energy Policy and Conservation Act, as amended ("EPCA"). The working group will consist of representatives of parties having a defined stake in the outcome of the proposed standards and/or test procedure, and will consult as appropriate with a range of experts on technical issues. DOE is hereby soliciting nominations for members of the CUAC and CUHP working group.

Application packages should be submitted to DOE by **[INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**DATES:** Nominations of membership must be received on or before **[INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

DOE will not consider any nominations received via mail or after midnight on **[INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** The nominee's name, resume, biography, and any letters of support must be submitted in electronic format via email to *asrac@ee.doe.gov*. Any requests for further information should also be sent via email to *asrac@ee.doe.gov*

**FOR FURTHER INFORMATION CONTACT:** John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 586-7335. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

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### **I. Authority**

DOE is announcing its intent to negotiate proposed test procedures and amended energy conservation standards for CUACs and CUHPs under the authority of sections 563 and 564 of the NRA (5 U.S.C. 561-570, Pub. L. 104-320). DOE is seeking to develop proposals to amend the current test procedures and standards through a negotiated rulemaking process under the authority of EPCA, 42 U.S.C. 6311(1) and 42 U.S.C. 6291 *et seq.*

## **II. Background**

On July 21, 2022, the ASRAC met and made a recommendation to form a CUAC and CUHP subcommittee to meet, discuss, and, if possible, reach consensus on a proposed rule for the test procedures and energy efficiency standards for CUACs and CUHPs. For purposes of this document, the ASRAC subcommittee at issue will be referred to as the “working group.” As required by the NRA, DOE is giving notice that it is establishing a working group under ASRAC to discuss proposed amended test procedures and energy efficiency requirements for CUACs and CUHPs. The working group will be established and function as a subcommittee of ASRAC in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. 2.

### *A. Negotiated Rulemaking*

DOE is supporting the use of the negotiated rulemaking process to discuss and develop proposed test procedures and amended energy conservation standards for CUACs and CUHPs. The primary reason for using the negotiated rulemaking process for this equipment is that stakeholders strongly support a consensual rulemaking effort. DOE believes such a regulatory negotiation process will be less adversarial and better suited to

resolving complex technical issues. An important virtue of negotiated rulemaking is that it allows expert dialog that is much better than traditional techniques at getting the facts and issues right and will result in a proposed rule that will effectively reflect Congressional intent.

A regulatory negotiation will enable DOE to engage in direct and sustained dialog with informed, interested, and affected parties when drafting the regulation, rather than obtaining input during a public comment period after developing and publishing a proposed rule. A rule drafted by negotiation with informed and affected parties is expected to be potentially more pragmatic and more easily implemented than a rule arising from the traditional process. Such rulemaking improvement is likely to provide the public with the full benefits of the rule while minimizing the potential negative impact of a proposed regulation conceived or drafted without the full prior input of outside knowledgeable parties. Because a negotiating working group includes representatives from the major stakeholder groups, including consumers, affected by or interested in the rule, the number of public comments on the proposed rule may be decreased. DOE anticipates that there will be a need for fewer substantive changes to a proposed rule developed under a regulatory negotiation process prior to the publication of a final rule.

#### *B. The Concept of Negotiated Rulemaking*

Usually, DOE develops a proposed rulemaking using Department staff and consultant resources. Congress noted in the NRA, however, that regulatory development may “discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions \* \* \*.” 5 U.S.C. 561(2)(2). Congress also stated that “adversarial rulemaking

deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.” 5 U.S.C. 561(2)(3).

Using negotiated rulemaking to develop a proposed rule differs fundamentally from the Department centered process. In negotiated rulemaking, a proposed rule is developed by an advisory committee or a working group established by the advisory committee, in accordance with the provisions of FACA, 5 U.S.C. App. 2, composed of members chosen to represent the various interests that will be significantly affected by the rule. The goal of the advisory committee or its working group is to reach consensus on the treatment of the major issues involved with the rule. The process starts with the Department’s careful identification of all interests potentially affected by the rulemaking under consideration. To help with this identification, the Department publishes a notice of intent such as this one in the *Federal Register*, identifying a preliminary list of interested parties and requesting public comment on that list. Following receipt of comments, the Department establishes an advisory committee or advisory committee working group representing the full range of stakeholders to negotiate a consensus on the terms of a proposed rule. Representation on the advisory committee or its working group may be direct; that is, each member may represent a specific interest, or may be indirect, such as through trade associations and/or similarly situated parties with common interests. The Department is a member of the advisory committee or working group and represents the Federal government’s interests. The advisory committee or working group chair is assisted by a neutral mediator who facilitates the negotiation process. The role of the mediator, also called a facilitator, is to apply proven consensus-building techniques to the advisory committee or working group process.

If the advisory committee itself is undertaking the negotiation, once the committee reaches consensus on the provisions of a proposed rule and recommends such consensus to the Department, the Department, consistent with its legal obligations, may use such consensus as the basis of its proposed rule, which then is published in the *Federal Register*. If a working group of the advisory committee is undertaking the negotiation, once the working group reaches consensus on the provisions of a proposed rule, a recommendation is made to the advisory committee. The advisory committee may then, consistent with its legal obligations, use such consensus as the basis for making a recommendation to the Department of a proposed rule. The Department, consistent with its legal obligations, may use such consensus as the basis of its proposed rule, which then is published in the *Federal Register*. This publication provides the required public notice and provides for a public comment period. Other participants and other interested parties retain their rights to comment, participate in an informal hearing (if requested), and request judicial review. DOE anticipates, however, that the preproposal consensus agreed upon by the advisory committee will narrow any issues in the subsequent rulemaking.

*C. Proposed Rulemaking for Test Procedures and Energy Conservation Standards and Energy Conservation Standards Regarding CUACs and CUHPs.*

The NRA enables DOE to establish an advisory committee or working group under the advisory committee if it is determined that the use of the negotiated rulemaking process is in the public interest. DOE intends to develop Federal regulations that build on the depth of experience accrued in both the public and private sectors in implementing standards and programs.

DOE is supporting the use of the regulatory negotiation process in order to provide for obtaining a diverse array of in-depth input, as well as an opportunity for increased collaborative discussion from both private-sector stakeholders and government officials who are familiar with the energy efficiency of CUACs and CUHPs.

#### *D. Department Commitment*

In initiating this regulatory negotiation process to develop test procedures and amended energy conservation standards for CUACs and CUHPs, DOE is making a commitment to provide adequate resources to facilitate timely and successful completion of the process. This commitment includes making the process a priority activity for all representatives, components, officials, and personnel of the Department who need to be involved in the rulemaking, from the time of initiation until such time as a final rule is issued or the process is expressly terminated. DOE will provide administrative support for the process and will take steps to ensure that the advisory committee or its working group has the dedicated resources it requires to complete its work in a timely fashion. Specifically, DOE will make available the following support services: properly equipped space adequate for public meetings and caucuses; logistical support; word processing and distribution of background information; the service of a facilitator; and such additional research and other technical assistance as may be necessary. All meetings will provide an opportunity for all members of the working group and other interested parties to participate by webinar. While DOE strongly encourages members to participate in person, DOE realizes that travel costs may prohibit in-person attendance. Prospective members, therefore, should not allow travel costs to affect their decision to apply for membership.

To the maximum extent possible consistent with the legal obligations of the Department, DOE will use the consensus of the advisory committee as the basis for the rule the Department proposes for public notice and comment.

#### *E. Negotiating Consensus*

As discussed, the negotiated rulemaking process differs fundamentally from the usual process for developing a proposed rule. Negotiation enables interested and affected parties to discuss various approaches to issues rather than asking them only to respond to a proposal developed by the Department. The negotiation process involves a mutual education of the various parties on the practical concerns about the impact of standards. Each advisory committee or working group member participates in resolving the interests and concerns of other members, rather than leaving it up to DOE to evaluate and incorporate different points of view.

A key principle of negotiated rulemaking is that agreement is by consensus of all the interests. Thus, no one interest, or group of interests is able to control the process. The NRA defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee or working group, unless the committee or its working group itself unanimously agrees to use a different definition. 5 U.S.C. 562. In addition, experience has demonstrated that using a trained mediator to facilitate this process will assist all parties, including DOE, in identifying their real interests in the rule, and thus will enable parties to focus on and resolve the important issues.

### **III. Proposed Negotiating Procedures**

#### *A. Key Issues for Negotiation*



The following issues and concerns will underlie the work of the Negotiated Rulemaking Committee on CUACs and CUHPs:

- Test procedures for CUACs and CUHPs; and
- Energy Conservation Standards for CUACs and CUHPs.

To examine the underlying issues outlined above, and others not yet articulated, all parties in the negotiation will need DOE to provide data and an analytic framework complete and accurate enough to support their deliberations. DOE's analyses must be adequate to inform a prospective negotiation.

#### *B. Formation of Working Group*

A working group will be formed and operated in full compliance with the requirements of FACA and in a manner consistent with the requirements of the NRA. DOE has determined that the working group shall not exceed 25 members. The Department believes that more than 25 members would make it difficult to conduct effective negotiations. DOE is aware that there may be many more potential participants than there are membership slots on the working group. The Department does not believe, nor does the NRA contemplate, that each potentially affected group must participate directly in the negotiations; nevertheless, each affected interest can be adequately represented. To have a successful negotiation, it is important for interested parties to identify and form coalitions that adequately represent significantly affected interests. To provide adequate representation, those coalitions must agree to support, both financially and technically, a member of the working group whom they choose to represent their interests.

DOE recognizes that when it establishes or amends energy efficiency standards and test procedures for residential products and commercial equipment, various segments of society may be affected in different ways, in some cases producing unique “interests” in a proposed rule based on income, gender, or other factors. The Department will pay attention to providing that any unique interests that have been identified, and that may be significantly affected by the proposed rule, are represented.

FACA also requires that members of the public have the opportunity to attend meetings of the full committee and speak or otherwise address the committee during the public comment period. In addition, any member of the public is permitted to file a written statement with the advisory committee. DOE plans to follow these same procedures in conducting meetings of the working group.

### *C. Interests Involved/Working Group Membership*

DOE anticipates that the working group will comprise no more than 25 members who represent affected and interested stakeholder groups, at least one of whom must be a member of the ASRAC. As required by FACA, the Department will conduct the negotiated rulemaking with particular attention to ensuring full and balanced representation of those interests that may be significantly affected by the proposed rule amending standards for CUACs and CUHPs. Section 562 of the NRA defines the term “interest” as “with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.” Listed are parties the Department to date has identified as being “significantly affected” by a proposed rule regarding the energy efficiency of CUACs and CUHPs.

- The Department of Energy;
- States;

- Trade associations representing installers and distributors of CUACs and CUHPs;
- Heating and cooling system designers and engineers;
- Component manufacturers and related suppliers;
- Utilities;
- Energy efficiency/environmental advocacy groups;
- Commercial building owners; and
- Commercial building tenants.

One purpose of this notice of intent is to determine whether Federal regulations for CUACs and CUHPs will significantly affect interests that are not listed previously. DOE invites comment and suggestions on its initial list of significantly affected interests and encourages all interested parties and interests to apply for the Working Group.

Members may be individuals or organizations. If the effort is to be fruitful, participants on the working group should be able to fully and adequately represent the viewpoints of their respective interests. This document gives notice of DOE's process to other potential participants and affords them the opportunity to request representation in the negotiations. Those who wish to nominate members to the working group, should submit an application package to DOE, in accordance with the public participation procedures outlined in the **DATES** and **ADDRESSES** sections of this notice of intent. Qualified individuals can self-nominate or be nominated by any individual or organization. Nominators should submit an application package which includes:

- The nominee's current resume or curriculum vitae and contact information, including mailing address, email address, and telephone number;
- A letter of interest, which includes:

- A summary of how the nominee's experience and expertise would support the working group's objectives;
- The interest the nominee would represent in the working group; and
- A description of other assets (such as data or modeling tools) the nominee could provide to support the working group's objectives.

Membership of the working group is likely to involve:

- Attendance (in person preferable) at approximately ten (10), one (1)- to two (2)-day meetings (with the potential for two (2) additional one (1)- or two (2)-day meetings);
- Travel costs to those meetings, if participating in person; and
- Preparation time for those meetings.

Members serving on the working group will not receive compensation for their services. Interested parties who are not selected for membership on the working group may make valuable contributions to this negotiated rulemaking effort in any of the following ways:

- The person may request to be placed on the working group mailing list and submit written comments as appropriate.
- The person may attend working group meetings, which are open to the public; caucus with his or her interest's member on the working group; or even address the working group during the public comment portion of the working group meeting.
- The person could assist the efforts of a workgroup that the working group might establish.

A working group may establish informal workgroups, which usually are asked to facilitate committee deliberations by assisting with various technical matters (*e.g.*, researching or preparing summaries of the technical literature or comments on specific matters such as economic issues). Workgroups also might assist in estimating costs or drafting regulatory text on issues associated with the analysis of the costs and benefits addressed, or formulating drafts of the various provisions and their justifications as previously developed by the working group. Given their support function, workgroups usually consist of participants who have expertise or particular interest in the technical matter(s) being studied. Because it recognizes the importance of this support work for the working group, DOE will provide appropriate technical expertise for such workgroups.

#### *D. Good Faith Negotiation*

Every working group member must be willing to negotiate in good faith and have the authority, granted by his or her constituency, to do so. The first step is to ensure that each member has good communications with his or her constituencies. An intra-interest network of communication should be established to bring information from the support organization to the member at the table, and to take information from the table back to the support organization. Second, each organization or coalition therefore should designate as its representative a person having the credibility and authority to ensure that needed information is provided and decisions are made in a timely fashion. Negotiated rulemaking can require the appointed members to give a significant sustained time commitment for as long as the duration of the negotiated rulemaking. Other qualities of members that can be helpful are negotiating experience and skills, familiarity with using CUACs and CUHPs systems as a consumer, and/or sufficient technical knowledge to participate in substantive negotiations.

Certain concepts are central to negotiating in good faith. One is the willingness to bring all issues to the bargaining table in an attempt to reach a consensus, as opposed to keeping key issues in reserve. The second is a willingness to keep the issues at the table and not take them to other forums. Finally, good faith includes a willingness to move away from some of the positions often taken in a more traditional rulemaking process, and instead explore openly with other parties all ideas that may emerge from the working group's discussions.

#### *E. Facilitator*

The facilitator will act as a neutral in the substantive development of the proposed standard. The facilitator's role generally includes:

- Impartially assisting the members of the working group in conducting discussions and negotiations; and
- Impartially assisting in performing the duties of the Designated Federal Official under FACA.

#### *F. Department Representative*

The DOE representative will be a full and active participant in the consensus building negotiations. The Department's representative will meet regularly with senior Department officials, briefing them on the negotiations and receiving their suggestions and advice so that he or she can effectively represent the Department's views regarding the issues before the working group. DOE's representative also will ensure that the entire spectrum of governmental interests affected by the standards rulemaking, including the Office of Management and Budget, the Attorney General, and other Departmental offices, are kept informed of the negotiations and encouraged to make their concerns known in a timely fashion.

### *G. Working Group and Schedule*

After evaluating the comments submitted in response to this notice of intent and the requests for nominations, DOE will either inform the members of the working group that they have been selected or determine that conducting a negotiated rulemaking is inappropriate.

The working group is expected to make a concerted effort to negotiate a first term sheet on the test procedure and a second term sheet on energy conservation standards within six (6) months of its first meeting. The working group's negotiations will take place around two discrete tasks. The test procedure term sheet, if completed, is to be approved by the working group and transmitted to ASRAC prior to commencement of negotiations regarding the energy conservation standards. At the completion of the negotiations for each discrete task, the term sheet, if completed, will be presented to ASRAC at an open meeting for its deliberation and decision on whether to approve it and submit it to DOE as a formal recommendation.

DOE will advise working group members of administrative matters related to the functions of the working group before beginning. While the negotiated rulemaking process is underway, DOE is committed to performing much of the same analysis as it would during a normal standards rulemaking process and to providing information and technical support to the working group.

### **IV. Comments Requested**

DOE requests comments on which parties should be included in a negotiated rulemaking to develop draft language pertaining to the energy efficiency of CUACs and

CUHPs and suggestions of additional interests and/or stakeholders that should be represented on the working group. All who wish to participate as members of the working group should submit a request for nomination to DOE.

## **V. Public Participation**

Members of the public are welcome to observe the business of the meeting and, if time allows, may make oral statements during the specified period for public comment. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, email *asrac@ee.doe.gov*. In the email, please indicate your name, organization (if appropriate), citizenship, and contact information. Please note that foreign nationals participating in the public meeting are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE as soon as possible by contacting Ms. Regina Washington at (202) 586–1214 or by email:

*Regina.Washington@ee.doe.gov* so that the necessary procedures can be completed.

Anyone attending the meeting will be required to present a government photo identification, such as a passport, driver's license, or government identification. Due to the required security screening upon entry, individuals attending should arrive early to allow for the extra time needed.

## **IV. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this notice of intent and solicitation of nominations for membership.



## Signing Authority

This document of the Department of Energy was signed on July 25, 2022, by Kelly J. Speakes-Backman, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on July 26, 2022.

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Treena V. Garrett,  
Federal Register Liaison Officer,  
U.S. Department of Energy.

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